Supreme Court, U.S.
FILED
MAY 26 2000
CLERK

(3)

No. 99-1710

In The

SUPREME COURT OF THE ~~UNITED STATES~~

STATE OF UTAH,

Petitioner,

vs.

LINDA CANNON

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ISSUES PRESENTED FOR REVIEW

Under Utah Code Annotated 58-37-13(1953) as enacted in 1993, Mrs. Cannon's residence was not used to produce, cultivate, or manufacture a controlled substance. Therefor the State relied on a provision of law that provided that if marijuana with a street value in excess of $1000 was found at the residence and if the owner of that interest knew about or willingly consented to the presence of the marijuana on the property. The Utah Supreme Court established a common sense and manageable manner of applying of the excessive fine clause of the Eighth Amendment in Utah and created a threshold under which the State of Utah cannot forfeit a personal residence value forfeited is found to be grossly disproportional to the criminal conduct triggering the forfeiture, the fines imposed and the sentence imposed.

This Brief in Opposition to the Petition presents the following questions:

1. Should this Court return to the traditional "guilty property" theory for forfeiture analysis of property other than contraband rejected in Austin v. United States, 509 U. S. 602 (1993)?

2. Did the Utah Supreme Court specifically recognized the remedial aspects of an "in rem" instrumentality forfeiture when the Utah Supreme Court found for the purposes of the Cannon forfeiture proceeding that the subject house in fact was an instrumentality subject to forfeiture?

3. Did the District Court err in supplementing the record on remand by taking judicial notice of matters not considered at the first hearing by judicial notice and did the procedure denied the appellant and Mrs. Cannon her rights to Due Process under the United States Constitution and Utah Constitution?

PARTIES TO THE PROCEEDING

Linda Cannon is the Claimant to the subject real property, and was the Defendant in the Trial Court and Appellant in Utah Supreme Court, and Respondent in the instant case.

State of Utah is the Plaintiff in the Trial Court, the Appellee in Utah Supreme Court and the Petitioner in the instant case.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Eight Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

2. Utah Code Ann. § 58-37-13 (1996), is reprinted in Appendix 1.

STATEMENT OF FACTS

The Respondent, Linda Cannon, disputes the statement of material facts set forth in the Petition for Writ of Certiorari filed by the State of Utah. The Utah Supreme Court specifically reserved ruling on factual issues raised by the Respondent in the Appeal to the Utah Supreme Court as to the propriety of the trial court's use of judicial notice. (See Point III, herein). The Petitioner's Statement of Facts includes facts improperly made part of the record through the judicial notice process and the Respondent has consistently objected to the consideration of those facts.

The Respondent submits the objective facts proven by admissible evidence at the forfeiture hearing on August 23, 1994 are the only undisputed material facts that should be considered in support of the Petition. The actual evidence introduced at the forfeiture hearing by both the State of Utah and Mrs. Cannon can be summarized as follows:

1. Linda Cannon was the owner of the real property located at 633 East 640 North, Orem, Utah and she was one of the five persons living in the family residence. (Record 228)

2. Officer Phillip Murphy served a search warrant on the subject residence on January 15, 1993 and he testified that when he entered the house to serve the warrant, he observed three women sitting around the kitchen table.

(Record 171)

3. The second witness, Officer Lee Fox, testified that the officers found in a refrigerator in the house approximately one pound of marijuana, a beam scale, and a set of finger scales in the subject house. On direct, he testified in his opinion that the street value of the marijuana was $4,536.00 if the bulk quantity was broken up for sale in one gram amount. (Record 176) This opinion was based upon the fact that there is 453 grams in a pound and the assumption that the entire bulk quantity would be distributed in one gram quantity. (Record 179)

4. On cross-examination, Officer Fox testified that in January 1993 a person in Utah County, Utah, could purchase a pound of marijuana between $800.00 and $900.00 dollars. (Record 179). He admitted that the marijuana found in the residence could have been smoked instead of sold. (Record. 180) The marijuana was packaged in a single bag when weighed by the state laboratory were 446 grams of marijuana. (Record 187). He testified that marijuana is typically sold in bags containing 3.5 grams not one gram bag (Record 187). The Officer testified that when he went into the residence the marijuana was in the freezer section of the kitchen refrigerator and there was three women were sitting in the kitchen smoking a joint of marijuana. (Record 182)

5. Officer Fox testified that all throughout the residence the law enforcement officers found paraphernalia such as pipes, rolling papers, and ashtrays with a marijuana residue that would be consistent with the consumption of marijuana. (Record 183). He stated that Pat Smith, one of the women at the kitchen counter was charged with a felony on the basis of the evidence found in the house. Jodie Jackson was also charged with a crime for the controlled substances in the residence. (Record 184). The officer had personal knowledge that the two male residents, Paul Cannon and Brent Jackson were both known to law enforcement as users of marijuana. (Record 185). None of the plastic bags typically used to distribute marijuana in 1/8th or in any other small amounts were found in the search of the residence. (Record 187)

6. Officer Mike Blackhurst was allowed by the Court over an objection of the Defendant to testify as to the search of the residence at the subsequent date of September 8, 1993 and a copy of the affidavit for Search Warrant was received into evidence Exhibit 4. (Record 192) The Court limited the evidence to:

> The sole purpose of the corroboration of the incident subject to the complaint and the burden that the state has in establishing that the dwelling place and possession of the controlled substance is more than merely use and the requirement that the warehousing storing protecting or manufacturing is as the statute requires. And going to that

> evidence, the court will permit it. However, as previously indicated in chambers off the record, I am not permitting it to expand the amount of controlled substance present at the time of the alleged forfeiture on the 15th of January, only to show that it may have been used at other times that purpose. (R. 192)

7. Lee Fox was recalled and testified that during the September 8, 1993-search that four one-ounce baggies of marijuana were found in the residence and other amounts of marijuana which totaled approximately one quarter of one pound. (Record199) The officer stated on cross-examination that Paul Cannon told him in September 1993, that the marijuana found in the residence was his marijuana. (Record 201). He testified that in his opinion the value of the marijuana on the second search would be less than the statutory amount of $1,000.00 in the amount of $300.00 to $400.00. (Record 201)

8. Jerry Lee Harper, a Provo police officer testified that on June 24, 1994, found that there was 164.5 grams of marijuana and 2.5 grams of marijuana in another area in the house. (Record 209)

9. After the State rested, Linda Cannon, took the stand and she testified that at the time of the hearing she had been recently convicted in August 1994 for a criminal conviction for the same one pound marijuana in the refrigerator upon which the forfeiture action was based. (Record 225)

10. Mrs. Cannon testified that as a result of the same incident and the 451 grams of marijuana found in the residence was the basis for a tax

assessment by the Utah Tax Commission for a lack of tax stamps. (Record 228). The Claimant Linda Cannon as an owner of the residence prior to the forfeiture hearing had been subjected a judgment for tax by the Utah State Tax Commission in the amount of $3,500.10 as a result of the marijuana which was used for the basis of the criminal conviction set forth above and also for this forfeiture action. (The Utah Supreme Court did not rule on the double jeopardy issue on appeal because of the reversal based on the excessive fine clause).

11. The Respondent described to the trial court that she had lived in the residence since June of 1973 when she purchased the residence with her first husband, Daryl Jensen. (Record 230). She was living in the residence with her mentally disabled daughter Dixie Jensen. Mrs. Jensen testified that she received money from her ex-husband and Social Security which she had used to pay the first mortgage of about $30,000.00 on the home which had an equity value at $80,000.00. (Record. 232). Mrs. Cannon testified that she was fifty years of age and had no other assets other than the home. She testified that she intended to live in the house after the house with her new husband and her disabled child after she had completed the jail sentence in relation to her criminal conviction.(Record 234).

12. On July 22, 1997, the Utah Supreme Court entered a decision in

State of Utah v. Real Property at 633 East 640 North, Orem, Utah, 942 P.2d 925 (Utah 1997).

13. In that decision, the Utah Supreme Court remanded the matter to the District Court because of the Trial Court's failure to rule on the Eighth Amendment issue raised by Linda Cannon and the Judge failed to the necessary factual findings crucial to the constitutional issues.

14. After the matter was remanded to the Utah County District Court hearing, the Claimant filed proposed Findings of Fact and Conclusions of Law based upon the actual evidence introduced at trial and a memorandum in support of the Claimant's proposed Findings of Fact and Conclusions of Law with the District Court.

15. The State filed a Memorandum in support of the Plaintiff's response to Claimant's Proposed Finding of Fact and Conclusions of Law submitting new facts and requesting the Court to take judicial notice of these facts. The Claimant, Linda Cannon, in response requested oral argument before the Court by written Motion filed with the court.

16. On January 21, 1998, Third District Court Judge Ray M. Harding Sr., denied the request for oral arguments. Without holding a hearing and without any new evidence being offered in the proceedings, the Court proceeded to execute without notice to the Claimant, the "Findings of Fact and

Conclusions of Law upon Remand."

17. As result of the Stipulation whereby the residence was sold and the equity interest held in trust by the State pending appeals. On April 17, 2000, the trial court in Provo entered a Judgement in favor of Mrs. Cannon for the amount of the equity interest for the house that was sold by the State. No stay has been granted by District Court of Utah as to the Judgement. In granting the Motion for Judgement, the trial Court denied the request of the State of Utah for a stay of the Judgment pending the Petition to this Court.

REASONS FOR DENYING THE WRIT

The Utah Supreme Court was unanimous in setting aside an unjust and harsh forfeiture of a family residence. It issued a well-reasoned decision concerning basic Eighth Amendment standards in the context of the Utah statute. The decision was an extension of prior Utah law interpreted in the context of Federal principles announced by this Court. The Utah Court established a common sense and manageable manner of applying the excessive fine clause of the Eighth Amendment in Utah and created a threshold under which the State of Utah cannot forfeit a personal residence where marijuana is found if the forfeiture is grossly disproportional to the criminal conduct triggering the forfeiture.

I. THE UTAH SUPREME COURT APPLIED THE PRECEDENT PROPERLY IN FORMULATION A TEST IN THE ATTEMPTED FORFEITURE BY LAW ENFORCEMENT OF A FAMILY RESIDENCE.

Contrary to the State's position, the Utah Supreme Court specifically recognized the remedial aspects of "in rem" instrumentality forfeiture when the Utah Supreme Court found for the purposes of the Cannon forfeiture proceeding that the subject house in fact was an instrumentality subject to forfeiture. The Court ruled that the instrumentality test of controlled substance forfeiture was satisfied as the subject residence in State v. Cannon, 2000 UT 17 at 22 (Utah 01/19/2000) stating:

> "We similarly hold that the threshold test in real property forfeitures is whether the defendant property is an instrumentality of the offense. If instrumentality is proven, we must then examine whether the ordered forfeiture is "grossly disproportionate" to the offense. However, because in the instant case we rest our decision on gross disproportionality, we will assume for purposes of discussion, but not decide, that the instrumentality test has been satisfied."

The remedial, instrumentality aspect for forfeiture proceedings is the first prong of two-prong tests for all forfeiture actions under *Utah Code Annotated* 58-37-13 (1953). By ruling that this particular forfeiture of real property was "grossly" disproportional and excessive, the Utah Supreme Court did not prohibit or unreasonably limit future forfeitures by the State that are

reasonable and objectively related to proven remedial purposes and punishment objectives.

The State seeks a review in this matter by shaping complicated, theoretical arguments which disregard the basic inequity of the forfeiture. The Utah Supreme Court's straightforward and direct ruling in this particular case should not materially limit controlled substance forfeitures of real property in the State of Utah. The State needs only to present evidence that the attempted forfeiture does 'bear some relationship to the gravity of the offense it is designed to punish.' United States v. Johnson, 182 F.3d 934 (10th Cir. 1999)(citing United States v. Bajakajian, 118 S.Ct. 2028 (1998)). The claimant then has the burden to show that forfeiture of his property would be grossly disproportionate given the nature and extent of his criminal culpability.

The trial court's test of forfeiture did not consider the monetary value of the property, the extent of criminal activity associated with the property, the fact that the property was a residence, the effect of forfeiture on innocent occupants of the residence, including children, or any other fact other than the mere presence of marijuana. A review of the evidence offered at trial in this matter will show that the State never attempted to actually prove any remedial aspect of the forfeiture at the hearing or the value of the property. The trial Court never found any remedial purpose for the forfeiture other than a bulk

quantity of more than $1,000.00 worth of marijuana in the house. The State did introduce evidence of two subsequent searches where less than the statutory amount of $1,000.00 was found as well as drug paraphernalia. Further, the State has never identified the specific "remedial purpose" that a forfeiture of the equity value of the house would have which would be advanced by the transfer to the State of Mrs. Cannon's $72,000.00 equity to the Utah County Drug Task Force.

The Utah Supreme Court relied on the prior Utah decision in State v. A House and 1.37 Acres of Real Property Located at 392 South 600 East, Nephi, Utah, 886 P.2d 534 (Utah 1994) where the Utah Court stated in an action to forfeit a house under the same statute as involved in this Petition:

> "According to the plain import of this provision, [Utah Cond Annotated 58-37-13 (1953)] any interest in real property is automatically subject to forfeiture if (i) it was "used in producing, cultivating, or manufacturing controlled substances," and (ii) the owner of the property interest knew about or willingly consented to the act which made the property subject to forfeiture. Utah Code Ann. ° 58-37-13(1)(i)(ii), (iii). **A different standard applies, however, if the real property interest is used to facilitate a violation of the act which does not involve the producing, cultivating, or manufacturing of a controlled substance. In that case, the property interest is subject to forfeiture only if (i) "cumulative sales of controlled substances on the property within a two-month period total or exceed $1,000, or the street value of any controlled substances found on the premises at any given time totals or exceeds $1,000," and (ii) the owner of the property interest knew about or willingly consented to the act which made the**

property subject to forfeiture. Id. (emphasis added). The Residence was not used to produce, cultivate, or manufacture a controlled substance. The record clearly indicates, however, that marijuana with a street value in excess of $1000 was found at the residence. Thus, any property interest in the Residence is subject to forfeiture if the owner of that interest knew about or willingly consented to the presence of the marijuana on the property. **"(Emphasis added)**

"We are persuaded that the analysis in Austin applies equally to section 58-37-13(1)(i). As pointed out in Austin, "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence." Id. at 2812 n.14. In addition, as was true of the federal statutes at issue in Austin, section 58-37-13(1)(i) contains an "innocent-owner" defense. Utah Code Ann. §§ 58-37-13(1)(i)(ii). This exemption serves to "focus the provision[] on the culpability of the owner in a way that makes [it] look more like punishment, not less." Austin, 113 S. Ct. at 2811. Finally, the Austin Court essentially foreclosed any claim that the forfeiture of real property could be viewed as reasonable liquidated compensation to the state for the expense of law enforcement activity and social expenditures related to drug addiction. According to Austin, "The value of the conveyances and real property forfeit able under §§§§ 881(a)(4) and (a)(7) . . . can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." Id. at 2812 n.14; see also United States v. Ward, 448 U.S. 242, 254, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980) (holding that "forfeiture of property . . . [is] a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing the law"). In light of the historical understanding of forfeiture as punishment, the focus of section 58-37-13(1)(i) on the culpability of the owner, and the Supreme Court's rejection of the notion that forfeiture is a reasonable liquidated compensation to the state, we conclude that section 58-37-13(1)(i) is punitive, at least in part. A forfeiture pursuant to that section is therefore subject to the limitations of the Eighth Amendment's Excessive Fines Clause."

In the ruling here, the Utah Supreme Court was continuing and refining the 1994 ruling which applied the excessive fine clause of the Eighth Amendment of the United States Constitution to the same language used to attempt to statutorily forfeit the Cannon residence. The ruling was made in the context of the Utah statutes that distinguish between the forfeiture requirements as to real property used for producing, cultivating, or manufacturing of a controlled substance and the forfeiture requirements real property where controlled substances assumed to be held for sale are found. The classification difference of Utah Code Annotated 58-37-13 (1953) was a material basis in the Nephi ruling and was taken into account in the ruling in Cannon. The State fails in the petition to recognize that the forfeiture statute itself focuses on the owners knowledge and the underlying criminal offense, regardless of any Eighth Amendment analysis.

The Federal Courts have adopted the Bajakajan doctrine to the Federal Controlled Substance Statutes. For example, in United States v. Gaston, 176 F.3d 476 (4th Cir. 1999), the Fourth Circuit Court ruled that criminal forfeiture under 21 U.S.C. 853 is an element of the sentence imposed following a defendant's conviction for substantive drug offenses. The Court in Gaston, characterized as a forfeiture punishment with the sole inquiry in analyzing whether the forfeiture is constitutionally excessive is whether the forfeiture "is

grossly disproportional to the gravity of a defendant's offense" following United States v. Bajakajian, 118 S.Ct. 2028 (1998).

Likewise, the States have made similar ruling in One 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558 (D.C. 10/01/1998). There the Court applied the proportionality test of Bajakajian to the present case, we conclude the forfeiture of a truck and the forfeiture was deemed a constitutionally excessive fine. Also, in Muhar v. One 1997 Harley-Davidson Motorcycle, No. C6-99-1053 (Minn. App. 12/21/1999). The Court applied Bajakajian's "gross disproportionality" test in upholding an excessive-fines challenge under the vehicle forfeiture statute.

Here, the trial court accepted the evidence that Marijuana was found in the residence and declared a forfeiture without considering whether the punishment was excessive despite repeated requests by Mrs. Cannon to raise excessive punishment and proportionality issue before the Court. The trial judge treated forfeiture to the State as automatic if marijuana was found in the residence and did not even consider the actual punishment received by Mrs. Cannon in the underlying criminal matter. This draconian ruling of automatic forfeiture demonstrates the need for specific legal tests setting thresholds and guidance to trial courts to prevent the manifest injustice which caused the windfall to the State. The States position in the Petition that the remedial aspect

of the forfeiture proceeding of any type of real estate can be quantified and given a partial monetary value is a unique, illogical and impractical position which needs no "clarification" by this Court and was unanimously rejected by the Utah Supreme Court. The Utah Supreme Court applied the precedent of this Court properly in formulation a litmus test in the attempted forfeiture by law enforcement of a family residence in the context of the specific Utah Statute.

II. THE FORFEITURE PROCEEDINGS UNDER THE UTAH CONTROLLED SUBSTANCE ACT CANNOT BE LABELED AS TRADITIONAL CIVIL IN REM PROCEEDINGS

In Austin v. United States, 509 U.S. 602 (1993), this Court recognized that the characterization of proceeding as civil or in rem does not exempt forfeitures from the restriction of the Eighth Amendment excessive fine clause. The Court held that civil forfeitures which are intended to punish in whole or part, are subject to the clause. In Austin, the Court was dealing with the forfeiture of real property and held that even though there was evidence to prove the real property was used to facilitate the commission of a drug crime the proceedings were punitive in part and subject to the excessive fine clause.

The importance of the attempted characterization of this forfeiture proceeding as civil "in rem" tantamount to forfeiture of pure contraband urged by the State should be viewed in light of the current Utah statute forfeiture

controlled substance statute, Utah Code Annotated 58-37-13-9 (1953) (Set forth in Appendix 1). Under the present Utah statutory scheme the State can elect as to filing in the pending criminal proceedings, "in personam" or file a separate proceeding; civil "in rem" proceeding. Utah Code Annotated 58-37-13-9(a) or (b) (1953).(Appendix 1). A graphic example of the similarity of "in personam" or "in rem" proceedings is demonstrated by the following clause:

> **Utah Code Annotated 58-37-13-9 (c)** A complaint seeking forfeiture under Subsection (2)(k) shall be prepared by the county attorney, or if within a prosecution district, the district attorney, or by the attorney general, either in personam as part of a criminal prosecution, or in a separate civil in rem action against the property alleged to be proceeds, and filed in the county where the property is seized or encumbered, if the proceeds are located outside the state.

It is ironic that the State complains and petitions this Court to review the ruling of the Utah Supreme Court based upon the claimed significant distinction between "in personam" and "in rem"proceedings when in practice in Utah there is no material difference. In reality, under the Utah statute the distinction is blurred and there are not two separate distinct causes of action, only a procedural variance. Whether a person's residence is subject to a forfeiture in a proceeding "in rem" or "in personam" depends on how the County Attorney elects to file pleadings and how the action is styled. The substantive aspects are identical for forfeitures which can become"in rem"

when the pleading is typed at the County Attorney's Office.

In practice in Utah, the only meaningful distinction other than the heading on the pleadings is the type of notice given to interested parties. Under the State's interpretation of Utah Code Annotated 58-37-13 (1953), the notice requirement of an "in rem" proceeding can be by certified mail which will result in more forfeitures to the State than by personally serving the Defendant in a criminal Information, where forfeitures would be automatically set in light of the criminal sanctions imposed.

As an example, the heading in this case has evolved from "State v. Real Property at 633 East 640 North, Orem," to " State v. Linda Cannon". In the appeal process, Mrs. Cannon's personal interest in her residence and standing has been recognized and the technical "in rem" title styled by the State has been correctly modified during the appeal process to reflect the fact that she is the actual party.

The State is seeking to have this Court return to the traditional "guilty property" theory for forfeiture analysis of property other than contraband rejected in Austin v. United States, 509 U. S. 602 (1993), and United States v. Bajakajian, 118 S. Ct. 2028 (1998). The State is also trying to turn back the clock beyond recent decisions of the Utah Supreme Court to a position which will give the State tactical advantage in pleading cases in a manner that

removes the interest of the property owner and the results of the criminal proceedings from the forfeiture litigation.

The State failed to give any valid reason why this Court should interpret the application of specific statutory language of a State's forfeiture law when the State Supreme Court followed constitutional principles set forth by this Court. Since the Utah Statutory Scheme defines the grounds for forfeiture, this Court should not be interpreting the legislative enactments of Utah because the party believes the Utah Supreme Court mis-interpreted forfeiture law.

The Courts have recognized that actual contraband such as marijuana or liquor is subject to a "pure" in rem forfeiture. However, while a pure in rem proceeding against contraband may not be subject to the excessive fine clause, the Courts have consistently used the mere title is not determinative applicable because the forfeiture is not entirely remedial. In re 1650 cases of seized liquor, 721A.2d.100 (Vermont Sup. Ct. 1998). The Utah Statutes specifically apply the innocent owner defense to real property not used for certain specified purposes and therefore the State cannot assert that the residence itself is contraband and subject to forfeiture without any analysis under the Eighth Amendment. As discussed in Point I, the Utah Supreme Court has traditionally specifically considered forfeitures involving personal

residences differently from other forfeitures. State v. A House and 1.37 Acres of Real Property Located at 392 South 600 East, Nephi, Utah, 886 P.2d 534 (Utah 1994)

In this Petition for review of Certiorari the State of Utah is taking the same harsh view that was taken at trial court level at the forfeiture hearing and which was rejected by the Utah Supreme Court. Even though Mrs. Cannon proved that the residence was primarily used for family living purposes and for basic housing for herself and her adult handicapped child, the trial court refused to consider any of that evidence. Only upon appeal did five justices of the Supreme Court in looking at all of the evidence and factors find that the forfeiture was grossly disproportional and issued a ruling to correct the injustice.

III. THE DISTRICT COURT ERRED IN SUPPLEMENTING THE RECORD BY TAKING JUDICIAL NOTICE OF MATTERS NOT CONSIDERED AT THE FIRST HEARING AND DENIED THE APPELLANT AND CLAIMANT DUE PROCESS UNDER THE UNITED STATES AND UTAH CONSTITUTION

Without the State even filing a motion and without any hearing, the trial Judge on remand from the Utah Supreme Court adopted the State proposed findings. The lower Court by "judicial notice" adopted new evidence never introduced at the original hearing. The new evidence was

submitted to the Court as attachments to the State's Memo in support of Proposed Findings of Fact. The Court received new evidence by merely signing the Findings on Remand advanced by the State without any hearing. The Utah Supreme Court on this issue in State v. Cannon, 2000 UT 17 (Utah 01/19/2000) said:

> ¶¶29 Cannon contends that the trial court violated her due process rights by taking judicial notice of the second and third searches of the defendant property as well as the resolution of criminal charges stemming from the second search. It is unnecessary to reach this question. In our above analysis of disproportionality, we have considered the controverted evidence regarding the second and third searches, but determined that the totality of all evidence does not raise Cannon's offenses to a level sufficient to overcome the disproportionality.
>
> ¶¶30 We additionally do not need to reach Cannon's contention regarding double jeopardy

On remand, the State never moved for the lower court to take judicial notice or give the Respondent any chance to object to the new evidence or the procedure to introduce the new evidence. Utah Rule of Evidence 201(b) only gives a court discretion to take judicial notice of a fact which is "not subject to reasonable dispute" because the fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In *Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451

(Utah Ct. App. 1988), the Utah Supreme Court held that, except in exceptional circumstances, courts would normally refuse to take judicial notice of a fact when such a motion is made for the first time on appeal. See id. at 456. The State presented no "compelling 'countervailing principle'" that would overcome the Utah Courts normal reluctance to take judicial notice in these circumstances.

In *State v. Yates,* 765 P.2d 251 (Utah 1988), the Court stated concerning taking of judicial notice that:

> "It is axiomatic that a court may not judicially notice a judgment in another case... To be noticed, a judgment in another case must be placed in evidence." *Coleman v. Texas Dep't of Public Safety*, 639 S.W.2d 34, 38 (Tex. Ct. App. 1982) (citation omitted). It is improper for a court to sua sponte take judicial notice of records and proceedings in other actions "without giving full notice to the parties and without giving them an opportunity to explain or rebut" the judicially noticed facts. *Ruggles v. Riggs*, 477 A.2d 697, 705-06 (Del. 1984). See *State v. Lance*, 23 Utah 2d 407, 464 P.2d 395, 400 (1970). Furthermore, courts should not take judicial notice of relevant evidence after the record to the proceeding before the court is closed. See *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 259 F.2d 662, 664 (5th Cir. 1958).

Using the newly submitted matters, the State creatively argued and prepared Findings of Fact which the Judge wholly adopted on the critical issues concerning the issue excessive punishment for which the Utah Supreme Court had remanded the case. The trial court made findings are based upon other

criminal proceedings never introduced at the original hearing. On the issue of punishment, it was only the Claimant, Linda Cannon, who actually presented evidence on the issue of excessive punishment. She took the stand and testified that she had been subject to actual incarceration as a punishment for the two pounds of marijuana which was found in the refrigerator. The State offered no rebuttal whatsoever until attempting to unilaterally submit supplemental information several years later on remand.

For example, the Court took notice of facts not established at the prior hearing. The court took judicial notice of evidence in an Order to Show Cause Hearing in the Findings of Fact which occurred six months after the August 1994 hearing in forfeiture hearing on February 22, 1995. The lack of Due Process and a fair hearing by the Court's procedure in taking judicial notice is demonstrated by the Findings of Fact and Conclusions of Law of the proceedings which took place in relation to other criminal proceedings in a completely separate case.

Therefore, the District Court erred in supplementing the record by taking judicial notice of matters not considered at the first hearing and the procedure denied the appellant and claimant Due Process and the United States Constitution and Utah Constitution. Mrs. Cannon took the stand and confronted the excessiveness of the forfeiture of her family residence at the

hearing and that evidence is only rebutted by the unilateral submissions of new evidence under improper and unfair of the use of the Rules of Evidence by the taking of judicial notice. Therefore, the Court should strike all evidence not submitted at the original hearing or deny this Petition by adopting the position of the Utah Supreme Court that even considering the contested evidence in the disproportionality analysis the forfeiture cannot stand.

CONCLUSION

For foregoing factual and legal reasons the ruling of the Utah Supreme Court should stand and the State's Petition for Writ of Certiorari should be DENIED.

DATED this 25th day of May, 2000.

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APPENDIX 1

APPENDIX 1

UTAH CODE ANNOTATED 58-37-13 Property subject to forfeiture -- Seizure -- Procedure.

(1) As used in this section:

(a) "Complaint" means a verified civil in rem complaint seeking forfeiture or any criminal information or indictment which contains or is amended to include a demand for forfeiture of a defendant's in personam interest in any property which is subject to forfeiture.

(b) "Drug distributing paraphernalia" means any property used or designed to be used in the illegal transportation, storage, shipping, or circulation of a controlled substance. Property is considered "designed to be used" for one or more of the above-listed purposes if the property has been altered or modified to include a feature or device which would actually promote or conceal a violation of this chapter.

(c) "Drug manufacturing equipment or supplies" includes any illegally possessed controlled substance precursor, or any chemical, laboratory equipment, or laboratory supplies possessed with intent to engage in clandestine laboratory operation as defined in Section **58-37d-3**.

(d) "Interest holder" means a secured party as defined in Section **70A-9-105**(1)(m), a mortgagee, lien creditor, or the beneficiary of a security interest or encumbrance pertaining to an interest in property, whose interest would be perfected against a good faith purchaser for value. A person who holds property for the benefit of or as an agent or nominee for another, or who is not in substantial compliance with any statute requiring an interest in property to be recorded or reflected in public records in order to perfect the interest against a good faith purchaser for value, is not an interest holder.

(e) "Proceeds" means property acquired directly or indirectly from, produced through, realized through, or caused by an act or omission and includes any property of any kind without reduction for expenses incurred in the acquisition, maintenance, or production of that property, or any other purpose.

(f) "Resolution of criminal charges" occurs at the time a claimant who is also charged with violations under Title 58, Chapters 37, 37a, 37b, 37c, or 37d enters a plea, upon return of a jury verdict or court ruling in a criminal trial, or upon dismissal of the criminal charge.

(g) "Violation of this chapter" means any conduct prohibited by Title 58, Chapters 37, 37a, 37b, 37c, or 37d or any conduct occurring outside the state which would be a violation of the laws of the place where the conduct occurred and which would be a violation of Title 58, Chapters 37, 37a, 37b, 37c, or 37d if the conduct had occurred in this state.

(2) The following are subject to forfeiture and no property right exists in them:

(a) all controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this chapter;

(b) all raw materials, products, and equipment of any kind used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this chapter;

(c) all property used or intended for use as a container for property described in Subsections (2)(a) and (2)(b);

(d) all hypodermic needles, syringes, and other paraphernalia, not including capsules used with health food supplements and herbs, used or intended for use to administer controlled substances in violation of this chapter;

(e) all conveyances including aircraft, vehicles, or vessels used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, simple possession, or concealment of property described in Subsections (2)(a) and (2)(b), except that:

(i) a conveyance used by any person as a common carrier in the transaction of business as a common carrier may not be forfeited under this section unless the owner or other person in charge of the conveyance was a consenting party or knew or had reason to know of the violation of this chapter;

(ii) a conveyance may not be forfeited under this section by reason of any act or omission committed or omitted without the owner's knowledge or consent; and
(iii) any forfeiture of a conveyance is subject to the claim of an interest holder who did not know or have reason to know after the exercise of reasonable diligence that a violation would or did take place in the use of the conveyance;

(f) all books, records, and research, including formulas, microfilm, tapes, and data used or intended for use in violation of this chapter;

(g) everything of value furnished or intended to be furnished in exchange for a controlled substance in violation of this chapter, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter. An interest in property may not be forfeited under this subsection unless it is proven by a preponderance of the evidence that the interest holder knew, had reason to know of, or consented to the conduct which made the property subject to forfeiture. The burden of presenting this evidence shall be upon the state;

(h) all imitation controlled substances as defined in Section **58-37b-2**, Imitation Controlled Substances Act;

(i) all warehousing, housing, and storage facilities, or interest in real property of any kind used, or intended for use, in producing, cultivating, warehousing, storing, protecting, or manufacturing any controlled substances in violation of this chapter, except that:
(i) any forfeiture of a housing, warehousing, or storage facility or interest in real property is subject to the claim of an interest holder who did not know or have reason to know after the exercise of reasonable diligence that a violation would take place on the property;
(ii) an interest in property may not be forfeited under this subsection if the interest holder did not know or have reason to know of the conduct which made the property subject to forfeiture, or did not willingly consent to the conduct; and
(iii) unless the premises are used in producing, cultivating, or manufacturing controlled substances, a housing, warehousing, or storage facility or interest in real property may not be forfeited under this subsection unless cumulative sales of controlled substances on

the property within a two-month period total or exceed $1,000, or the street value of any controlled substances found on the premises at any given time totals or exceeds $1,000. A narcotics officer experienced in controlled substances law enforcement may testify to establish the street value of the controlled substances for purposes of this subsection;

(j) any firearm, weapon, or ammunition carried or used during or in relation to a violation of this chapter or any firearm, weapon, or ammunition kept or located within the proximity of controlled substances or other property subject to forfeiture under this section; and

(k) all proceeds traceable to any violation of this chapter. There is a rebuttable presumption that all money, coins, and currency found in proximity to forfeitable controlled substances, drug manufacturing equipment or supplies, drug distributing paraphernalia, or forfeit able records of importation, manufacture, or distribution of controlled substances are proceeds traceable to a violation of this chapter. The burden of proof is upon the claimant of the property to rebut this presumption.

(3) (a) Property subject to forfeiture under this chapter may be seized by any peace officer of this state upon process issued by any court having jurisdiction over the property. However, seizure without process may be made when:

(i) the seizure is incident to an arrest or search under a search warrant or an inspection under an administrative inspection warrant;

(ii) the property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this chapter;

(iii) the peace officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(iv) the peace officer has probable cause to believe that the property has been used or intended to be used in violation of this chapter and has probable cause to believe the property will be damaged, intentionally diminished in value, destroyed, concealed, or removed from the state.

(b) Upon the filing of a complaint, the court shall immediately issue to the seizing agency a warrant for seizure of any property subject to forfeiture which had been seized without a warrant in a manner described in this subsection.

(4) In the event of seizure under Subsection (3), forfeiture proceedings under Subsection (9) shall be instituted within 90 days of the seizure. The time period may by extended by the court having jurisdiction over the property upon notice to all claimants and interest holders and for good cause shown.
(5) Property taken or detained under this section is not repleviable but is in custody of the law enforcement agency making the seizure, subject only to the orders and decrees of the court or the official having jurisdiction. When property is seized under this chapter, the appropriate person or agency may:

(a) place the property under seal;

(b) remove the property to a place designated by it or the warrant under which it was seized; or

(c) take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(6) All substances listed in Schedule I that are possessed, transferred, distributed, or offered for distribution in violation of this chapter are contraband and no property right shall exist in them. All substances listed in Schedule I which are seized or come into the possession of the state may be retained for any evidentiary or investigative purpose, including sampling or other preservation prior to disposal or destruction by the state.

(7) All marijuana or any species of plants from which controlled substances in Schedules I and II are derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or are wild growths, may be seized and retained for any evidentiary or investigative purpose, including sampling or other preservation prior to disposal or destruction by the state. Failure, upon demand by the department or its authorized agent, of any person in occupancy or in control of land or premises upon which species of plants are growing or being stored, to produce an appropriate license or proof that he is the holder of a license, is authority for the seizure and forfeiture of the plants.

(8) When any property is forfeited under this chapter by a finding of the court that no person is entitled to recover the property, it shall be deposited in the custody of the Division of Finance. Disposition of all property is as follows:

(a) The state may include in its complaint seeking forfeiture, a request that the seizing agency be awarded the property. Upon a finding that the seizing agency is able to use the forfeited property in the enforcement of controlled substances laws, the court having jurisdiction over the case shall award the property to the seizing agency. Each agency shall use the forfeited property for controlled substance law enforcement purposes only. Forfeited property or proceeds from the sale of forfeited property may not be used to pay any cash incentive, award, or bonus to any peace officer or individual acting as an agent for the agency, nor may it be used to supplant any ordinary operating expense of the agency. The seizing agency shall pay to the prosecuting agency the legal costs incurred in filing and pursuing the forfeiture action. Property forfeited under this section may not be applied by the court to costs or fines assessed against any defendant in the case.

(b) The seizing agency, or if it makes no application, any state agency, bureau, county, or municipality, which demonstrates a need for specific property or classes of property subject to forfeiture shall be given the property for use in enforcement of controlled substances laws upon the payment of costs to the county attorney or, if within a prosecution district, the district attorney for legal costs for filing and pursuing the forfeiture and upon application for the property to the director of the Division of Finance. The application shall clearly set forth the need for the property and the use to which the property will be put.

(c) The director of the Division of Finance shall review all applications for property submitted under Subsection (8)(b) and, if the seizing agency makes no application, make a determination based on necessity and advisability as to final disposition and shall notify the designated applicant or seizing agency, where no application is made, who may obtain the property upon payment of all costs to the appropriate department. The Division of Finance shall in turn reimburse the prosecuting agency or agencies for costs of filing and pursuing the forfeiture action, not to exceed the amount of the net proceeds received for the sale of the property. Any proceeds remaining after payment shall be returned to the seizing agency or agencies.

(d) If no disposition is made upon an application under Subsection (8)(a) or (b), the director of the Division of Finance shall dispose of the property by public bidding or as considered appropriate, by destruction. Proof of destruction shall be upon oath of two officers or employees of the department having charge of the property, and verified by the director of the department or his designated agent.

(9) Forfeiture proceedings shall be commenced as follows:

(a) For actions brought under Subsections (2)(a) through (2)(j), a complaint shall be prepared by the county attorney, or if within a prosecution district, the district attorney, or the attorney general, and filed in a court of record where the property was seized or is to be seized. In cases in which the claimant of the property is also charged as a criminal defendant, the complaint shall be filed in the county where the criminal charges arose, regardless of the location of the property. The complaint shall include:

(i) a description of the property which is subject to forfeiture;

(ii) the date and place of seizure, if known; and

(iii) the allegations of conduct which gives rise to forfeiture.

(b) In cases where a claimant is also charged as a criminal defendant, the forfeiture shall proceed as part of the criminal prosecution as an in personam action against the defendant's interest in the property subject to forfeiture. A defendant need not file a written answer to the complaint, but may acknowledge or deny interest in the property at the time of first appearance on the criminal charges. If a criminal information or indictment is amended to include a demand for forfeiture, the defendant may respond to the demand at the time of the amendment.

(i) Unless motion for disposition is made by the defendant, the determination of forfeiture shall be stayed until resolution of the criminal charges. Hearing on the forfeiture shall be before the court without a jury. The court may consider any evidence presented in the criminal case, and receive any other evidence offered by the state or the defendant. The court shall determine by a preponderance of the evidence the issues in the case and order forfeiture or release of the property as it determines.

(ii) A defendant may move the court to transfer the forfeiture action, to stay all action, including discovery, in the forfeiture, or for hearing on the forfeiture any time prior to trial of the criminal charges. Either party may move the court to enter a finding of forfeiture as to defendant's interest in part or all of the property, either by default or by stipulation. Upon entry of a finding, the court shall stay the entry of judgment until resolution of the criminal charges. Any finding of forfeiture entered by the court prior to resolution of the criminal charges may not constitute a separate judgment, and any motion for disposition, stay, severance, or transfer of the forfeiture action may not create a separate proceeding. Upon the granting of a motion by the defendant for disposition, stay, severance, or transfer of the forfeiture action,

the defendant shall be considered to have waived any claim that the defendant has been twice put in jeopardy for the same offense.

(iii) Any other person claiming an interest in property subject to forfeiture under this subsection may not intervene in a trial or appeal of a complaint filed under this subsection. Following the entry of an in personam forfeiture order, or upon the filing of a petition for release under Subsection (e), the county attorney, district attorney, or attorney general may proceed with a separate in rem action to resolve any other claims up.. the property subject to forfeiture.

(c) A complaint seeking forfeiture under Subsection (2)(k) shall be prepared by the county attorney, or if within a prosecution district, the district attorney, or by the attorney general, either in personam as part of a criminal prosecution, or in a separate civil in rem action against the property alleged to be proceeds, and filed in the county where the property is seized or encumbered, if the proceeds are located outside the state. A finding that property is the proceeds of a violation of this chapter does not require proof that the property is the proceeds of any particular exchange or transaction. Proof that property is proceeds may be shown by evidence which establishes all of the following by a preponderance of the evidence:

(i) that the person has engaged in conduct in violation of this chapter;
(ii) that the property was acquired by the person during that period when the conduct in violation of this chapter occurred or within a reasonable time after that period; and
(iii) that there was no likely source for the property other than conduct in violation of the chapter.

(d) Notice of the seizure and intended forfeiture shall be filed with the clerk of the court, and served upon all persons known to the county attorney or district attorney to have a claim in the property by:

(i) personal service upon a claimant who is charged in a criminal information or indictment; and

(ii) certified mail to each claimant whose name and address is known or to each owner whose right, title, or interest is of record in the Division of Motor Vehicles to the address given upon the records of the division, which service is considered complete even though the mail is refused or cannot be forwarded. The county attorney, district attorney, or attorney general shall

make one publication in a newspaper of general circulation in the county where the seizure was made for all other claimants whose addresses are unknown, but who are believed to have an interest in the property.

(e) Except under Subsection (9)(a) in personam actions, any claimant or interest holder shall file with the court a verified answer to the complaint within 20 days after service. When property is seized under this chapter, any interest holder or claimant of the property, prior to being served with a complaint under this section, may file a petition in the court having jurisdiction for release of his interest in the property. The petition shall specify the claimant's interest in the property and his right to have it released. A copy shall be served upon the county attorney or, if within a prosecution district, the district attorney in the county of the seizure, who shall answer the petition within 20 days. A petitioner need not answer a complaint of forfeiture.

(f) For civil actions in rem, after 20 days following service of a complaint or petition for release, the court shall examine the record and if no answer is on file, the court shall allow the complainant or petitioner an opportunity to present evidence in support of his claim and order forfeiture or release of the property as the court determines. If the county attorney or district attorney has not filed an answer to a petition for release and the court determines from the evidence that the petitioner is not entitled to recovery of the property, it shall enter an order directing the county attorney or district attorney to answer the petition within ten days. If no answer is filed within that period, the court shall order the release of the property to the petitioner entitled to receive it.

(g) When an answer to a complaint or petition appears of record at the end of 20 days, the court shall set the matter for hearing. At this hearing all interested parties may present evidence of their rights of release of the property following the state's evidence for forfeiture. The court shall determine by a preponderance of the evidence the issues in the case and order forfeiture or release of the property as it determines.

(h) When the court determines that claimants have no right in the property in whole or in part, it shall declare the property to be forfeited.

(i) When the court determines that property, in whole or in part, is not subject to forfeiture, it shall order release of the property to the proper claimant. If the court determines that the property is subject to forfeiture and release in part, it shall order partial release and partial forfeiture. When the property cannot be divided for partial forfeiture and release, the court shall order it sold and the proceeds distributed:

(i) first, proportionally among the legitimate claimants;

(ii) second, to defray the costs of the action, including seizure, storage of the property, legal costs of filing and pursuing the forfeiture, and costs of sale; and

(iii) third, to the Division of Finance for the General Fund.

(j) In a proceeding under this section where forfeiture is declared, in whole or in part, the court shall assess all costs of the forfeiture proceeding, including seizure and storage of the property, against the individual or individuals whose conduct was the basis of the forfeiture, and may assess costs against any other claimant or claimants to the property as appropriate.

Amended by Chapter 294, 1996 General Session
Amended by Chapter 198, 1996 General Session